DOCKET

{SHDKT } PROCEEDINGS AND ORDERS DATE: 012

CASE NBR 84-1-05060 ASY CASE STATUS: DECIDED
SHORT TITLE Wright, Charles DOCKETED: Jul 9 19
VERSUS New Jersey

Entry	Date	Note	Proceedings and Orders
1	Jul 9 1984	D	Statement as to jurisdiction and motion for leave to proce in forma pauperis filed.
3	Jul 13 1984		Waiver of right of appellee New Jersey to respond filed.
4	Jul 19 1984		DISTRIBUTED. September 24, 1984
5	Sep 5 1984	P	Response requested -- WJB. (Due October 5, 1984 - NONE RECEIVED)
6	Oct 12 198^		Motion of appellee New Jersey to dismiss filed.
7	Oct 18 1984		REDISTRIBUTED. November 2, 1984
9	Nov 5 1984		REDISTRIBUTED. November 9, 1984
11	Nov 13 1984		REDISTRIBUTED. November 21, 1984
13	Nov 26 1984		REDISTRIBUTED. November 30, 1984
15	Dec 3 1984		REDISTRIBUTED. December 7, 1984
17	Dec 10 1984		REDISTRIBUTED. January 4, 1985
19	Jan 7 1985		REDISTRIBUTED. January 11, 1985
21	Jan 14 1985		Appeal DISMISSED for want of a substantial federal

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 012

CASE NBR 84-1-05060 ASY CASE STATUS: DECIDED
SHORT TITLE Wright, Charles DOCKETED: Jul 9 198
VERSUS New Jersey

Entry	Date	Note	Proceedings and Orders
21	Jan 14 1985		Appeal DISMISSED for want of a substantial federal question. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.) Justi Powell OUT.

****

BEST AVAILABLE COPY

JURISDICTIONAL STATEMENT

84-5060 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

RECEIVED
JUL 9 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No._____

RECEIVED
JUL 16 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES WRIGHT, Appellant

-v-

THE STATE OF NEW JERSEY, Appellee

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Appellant, Charles Wright, asks leave to file the attached Jurisdictional Statement and Brief for Appellant, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Appellant has previously been found to qualify for the services of the Office of the Public Defender at every stage of the proceedings in the courts of the State of New Jersey. Appellant's affidavit in support of this motion is attached hereto.

JOSEPH H. RODRIGUEZ
Public Defender of New Jersey

BY: John M. Apicella
JOHN M. APICELLA
Assistant Deputy Public Defender
Counsel for Appellant

48/p

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

No._____

CHARLES WRIGHT, Appellant

-v-

THE STATE OF NEW JERSEY, Appellee

AFFIDAVIT

I, Charles Wright, being duly sworn according to law, depose and say that I am the appellant in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; and that I believe I am entitled to the redress I seek in this case.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

A. Yes. I am presently employed at Heritage Lincoln Mercury, in Hackensack, New Jersey, and have been so since March, 1984 until the present. I work 8 hours per day 5 days per week and am paid $3.82 per hour. Prior to that I was incarcerated in New Jersey State Prison.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

A. No.

3. Do you own any cash or checking or savings account?

A. No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excuding ordinary household furnishings and clothing)?

A. No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Charles Wright
CHARLES WRIGHT

Sworn and subscribed to
before me on this 5th
day of July, 1984

John M. Russello
Attorney at Law of
the State of New Jersey

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

No._____

CHARLES WRIGHT, Appellant

-v-

THE STATE OF NEW JERSEY, Appellee

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

JOSEPH H. RODRIGUEZ
Public Defender of New Jersey

JOHN M. APICELLA
Assistant Deputy Public Defender
20 Evergreen Place
East Orange, New Jersey 07018

Attorneys for Appellant

APPENDIX

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Appendix B-	Order of the Supreme Court of New Jersey granting certification	B-1 to B-2
Appendix C-	Reported opinions of the Supreme Court of New Jersey entered on May 7, 1984	C-1 to C-24
Appendix D-	Notice of Appeal to the Supreme Court of the United States filed on July 5, 1984	D-1
Appendix E-	New Jersey Statutes Annotated 2C:39-5d	E-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

No._____

CHARLES WRIGHT, Appellant

-v-

THE STATE OF NEW JERSEY, Appellee

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Appellant, Charles Wright, appeals from the judgment of the Supreme Court of New Jersey entered on May 7, 1984, which affirmed his conviction for possession of a weapon under circumstances not manifestly appropriate for such lawful uses as it may have, N.J.S.A. 2C:39-5d. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are present.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, State v. Charles Wright, entered on October 15, 1982, is reported at 187 N.J. Super. 160, 453 A.2d 1352 (App. Div. 1982). A copy of that opinion is attached hereto as Appendix A.

The opinion of the Supreme Court of New Jersey is reported at ___ N.J. ___, ___ A.2d ___ (1984) along with its companion case, State v. Lee, ___ N.J. ___, ___ A.2d ___ (1984). Copies of the opinions are included as Appendix C.

JURISDICTION

Appellant Wright was tried to a jury in the Superior Court of New Jersey, Law Division, Bergen County and was convicted of possession of a weapon under circumstances not manifestly appropriate for such lawful uses as it may have, in contravention of N.J.S.A. 2C:39-5d. At trial and on appeal, appellant contended that the statute was violative of the United States Constitution because it was vague, overbroad and relieved the State of its burden of proof. The Appellate Division reversed the conviction, not because the statute was unconstitutional, but because the court found reversible error in the trial judge's charge that defined "manifestly" as "easily understood or recognized." The Appellate Division ruled instead that "manifestly" should be defined as "demonstrably." Therefor, the Appellate division reversed appellant's conviction because the trial court had reduced the State's burden of proof.

The New Jersey Supreme Court granted the petition for certification filed by the State as well as the cross-petition for certification filed by appellant again challenging the statute as unconstitutionally vague and/or overbroad. Copies of the orders are included as Appendix B. The Supreme Court of New Jersey subsequently reversed the opinion of the Appellate Division, reinstated appellant's conviction and held that the statute was constitutional, over a dissent by Justice Clifford. A Notice of Appeal was filed with the Supreme Court of New Jersey on July 5, 1984. A copy of that Notice is included as Appendix D.

Jurisdiction to review the decision of the Supreme Court of New Jersey is conferred by Title 28, United States Code, sec. 1257(2). Cohen v. California, 403 U.S. 15, 18 (1971).

QUESTONS PRESENTED

1. Whether N.J.S.A. 2C:39-5(d), which renders criminal mere possession of any number of lawful items which may be used as weapons if that possession is "under circumstances not manifestly appropriate for such lawful uses as it may have" is unconstitutionally vague and/or overbroad, in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether N.J.S.A. 2C:39-5(d) is unconstitutional because it relieves the State of its burden of proof, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

STATUTE INVOLVED

This appeal involves New Jersey Statutes Annotated 2C:39-5(d), which is set forth in Appendix E, as being violative of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

Defendant was found to be in mere possession of an exacto knife. The knife was fastened to his leg with a rubber band, under his sock. The one inch blade was covered with a piece of cardboard.

Defendant was tried to a jury on a charge of possession of a weapon, N.J.S.A. 2C:39-5(d). After the State rested, defendant moved for a judgment of acquittal arguing, inter alia that the statute was unconstitutional. The trial court denied the motion, reasoning that N.J.S.A. 2C:39-5(d) is more expansive than previous law. Where in the past the possession of an otherwise lawful knife

was made criminal by the intent of the possessor to use it as a weapon, the trial judge ruled that the new statute prohibits mere possession of "anything readily capable of deadly use or inflicting serious bodily injury unless it is apparent that the possession is appropriate for one of the lawful uses."

Defense counsel also argued that the statue unconstitutionally shifted the burden of proof onto defendant to explain the circumstances of his possession and that defendant would not do so. (2T69-21 to 70-19). Defendant rested without putting in any evidence.

Over defense objection the trial court charged the jury that it was "not necessary that the State prove that a defendant possessed the weapon with a purpose to use it unlawfully against the person or property of another." (2T106-10 to 14; 114-6 to 116-13).

Defendant was convicted and served a sentence of 200 days in the county jail.

Defendant appealed and on October 15, 1982, the Appellate Division of the Superior Court of New Jersey reversed defendant's conviction. The court rejected all of defendant's arguments challenging the constitutionality of the statute and defendant's argument that intent to use the exacto knife as a weapon must be read into the statute in order to save it from unconstitutionality. Instead, the Appellate Division, sua sponte ruled that the trial court erred in defining manifestly as easily understood or recognized from the circumstances. Therefore, the trial court's definition of "manifestly appropriate" impermissibly reduced the State's burden of proof. The Appellate Division ruled that manifestly meant demonstrably. Thus, the State's burden was to prove that the circumstances do not demonstrate that defendant possessed the weapon for any lawful use it might have.

The State petitioned for certification to the New Jersey Supreme Court arguing that the Appellate Division decision

judicially amended the statute in contravention of its clear legislative intent. Appellant cross-petitioned arguing that the statute is unconstitutional. Both petitions were granted. 93 N.J. 259 (1983).

On May 7, 1984, the Supreme Court issued two companion opinions, State v. Wright, ___ N.J. ___, ___ A.2d ___ (1984) the matter herein, and State v. Lee, ___ N.J. ___, ___ A.2d ___ (1984) wherein N.J.S.A. 2C:39-5(d) was found to be constitutional. One Justice dissented, finding that the try square of criminality, whether possession is not manifestly appropriate "is so lacking in any precise meaning as to defy definition." State v. Lee, supra, Justice Clifford dissenting, S.O. at 1, Appendix C at 19.

THE QUESTIONS ARE SUBSTANTIAL

A. Vagueness

There is no question that a criminal defendant may challenge a penal statute on vagueness grounds. In the most recent void-for-vagueness case decided by the United States Supreme Court, the Court considered a challenge to a California penal statute and held the statute unconstitutionally vague. Kolender v. Lawson, ___ U.S. ___, 103 S. Ct. 1855 (1983). See also Calautti v. Franklin, 439 U.S. 379, 99 S. Ct. 675 (1979); Lanzetta v. State of New Jersey, 306 U.S. 451, 59 S. Ct. 618 (1939).

The void for vagueness doctrine as applied to a criminal statute is concerned with fair warning to the person of ordinary intelligence that conduct is criminal, as well as arbitrary and discriminatory enforcement:

> (T)he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.... Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have

> recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement." ...Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep (that) allows policemen, prosecutors, and juries to pursue their personal predelictions."

Kolender v. Lawson, supra, 103 S. Ct. at 1858 (citations omitted). See also Smith v. Goguen, 415 U.S. 566, 574-578, 94 S. Ct. 1248-1250 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 2298-2299 (1972). Appellant submits that N.J.S.A. 2C:39-5d is unconstitutionally vague on both counts. A criminal statute which might conceivably have some valid application would nevertheless be void on vagueness grounds if it does not provide fair warning and fails to provide enforcement guidelines. As the Supreme Court has repeatedly observed:

> It would be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

Kolender v. Lawson, supra, 103 S. Ct. at 1859, n. 7, quoting United States v. Reese, 92 U.S. 214, 221 (1975). Appellant submits that N.J.S.A. 2C:39-5d likewise fails to provide fair warning or any guidelines save the subjective perception of a police officer.

Where the statute in question "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," the statute is unconstitutionally vague on its face and the defendant's actual conduct is irrelevant. Lanzetta v. New Jersey, supra, 306 U.S. at 453, 59 S. Ct. at 619. The Supreme Court has held:

> If on its face the challenged provision is repugnant to the due process clause, specification of the details of the offense

> intended to be charged would not serve to validate it.... It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.... No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.

Lanzetta v. New Jersey, supra, 306 U.S. at 453, 59 S. Ct. at 619. See also Calautti v. Franklin, supra; Kolender v. Lawson, supra, 103 S. Ct. at 1859, n. 8. The Supreme Court expressly recognized in Smith v. Goguen, supra, that there are two types of vagueness challenges. On the one hand, there are statutes that "by their terms or as authoratatively construed apply without question to certain activities, but whose application to other behavior is uncertain." Smith v. Goguen, supra, 415 U.S. at 578; 94 S. Ct. at 1249. On the other hand, a statute which fails to specify any comprehensible standard for what conduct is included and what conduct is excluded cannot be said to apply to any situation with any certainty and is therefore invalid without regard to the defendant's actual conduct. Appellant submits that N.J.S.A. 2C:39-5d falls into the latter category and is unconstitutional therefor.

As argued before the Courts of the State of New Jersey, in the absence of a proof of intent requirement, the words of N.J.S.A. 2C:39-5d establish "a prohibition which no citizen could follow with certainty." Ebron v. New Jersey, 377 F. Supp. 396, 401 (D.N.J. 1974); and fail to provide the guidance to law enforcement officers and juries necessary to prevent arbitrary and discriminatory application. Who decides whether the circumstances are not appropriate, and if not appropriate, whether manifestly so? What do these words mean? The Supreme Court has "long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." Colautti v. Franklin, supra, 439 U.S. at 395, 99 S. Ct. at 685. The

failure to require intent renders the statute "little more than a trap for those who act in good faith." Id. N.J.S.A. 2C:39-5d is precisely such a trap.

Moreover, as eloquently stated in the dissenting opinion of Justice Clifford, measuring criminal conduct in terms of what is or is not "manifestly appropriate" conduct is constitutionally intolerable because of the potential of "wild swings of meaning" in its definition. State v. Lee, supra, Justice Clifford dissenting, S.O. at 1, Appendix C at 23.

Our aesthetic sensibilities cannot be constitutionally protected from injury by inappropriate possession of lawful items by the use of criminal sanctions. Nor can the measuring device used to determine what is or is not criminal conduct be the subjective interpretation of individual police officers of what they consider to be "manifestly appropriate."

Under this statute, citizens of New Jersey possess lawful items at their peril depending upon whether that possession is determined to be "manifestly appropriate" by the various police officers who observe them.

B. The Burden of Proof

Appellant also submits that N.J.S.A. 2C:39-5d unconstitutionally relieves the State of its burden of proving an element of the offense by permitting a conviction for unlawful possession of a weapon without requiring the State to prove that the item was possessed for use as a weapon. As argued before the State Courts of New Jersey, N.J.S.A. 2C:39-5d punishes possession of items whose major uses are lawful, under circumstances which do not indicate that the possession was for the unlawful purpose of use as a weapon. The theory for punishing possession of lawful items which are capable of inflicting injury is that the item possessed is a weapon under the circumstances. However, the State is not required

to prove that the item is a weapon; an exacto knife is not an unlawfully possessed weapon unless it is possessed for the purpose of use as a weapon. Proof of possession under "circumstances not manifestly appropriate for such lawful use" as the knife may have, to the extent that these words impart some meaningful standard, does not indicate possession for the purpose of use as a weapon. N.J.S.A. 2C:39-5d thus permits conviction for unlawful possession of a weapon without requiring the State to prove "every fact necessary to constitute the crime" in violation of due process. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970).

Pennsylvania is the only other state where possession of a non per se weapon may become criminal under circumstances not manifestly appropriate for lawful use. The Pennsylvania statute however, specifically provides that the essential element of the crime defined is the intent to use the item criminally. 18 Pa. Cons. Stat. Ann. sec. 907 provides in relevant part the following:

> (b) A person commits a misdemeanor... if he possesses a firearm or other weapon concealed upon his person (or...) with intent to employ it criminally.
>
> (c) ..."Weapon." Anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have...

Sec. 907 does not suffer from the unconstitutional infirmity of placing the burden of proof on defendant because intent to use a non per se weapon criminally is the essential element of the crime. Commonwealth v. Cartagena, 428 Pa. 6, 393 A. 2d 350, 361 (1978). The burden is therefore on the prosecution to prove intent to employ the item criminally. Proof that an item is readily capable of lethal use and is possessed under circumstances not manifestly appropriate for lawful use only establishes that an otherwise lawful item is a weapon. The Commonwealth of Pennsylvania must still prove that the possessor of this item intended to employ it criminally. The burden of proof is thus clearly on the State of

Pennsylvania to prove each element of the crime.

The New Jersey statute, on the other hand, places the burden on the defendant to prove lawful use. Stated another way, once the State shows mere inappropriateness, it establishes its prima facie case. Once the State shows, for example, merely that a police officer observed a fork on the floor of the passenger seat of defendant's car, under the wording of the statute, since such possession is not under "manifestly appropriate" circumstances, the State could survive a motion for judgment of acquittal. Unless the defendant comes forward to explain that his 7 year old son dropped the fork on the floor of the car on the day before when the family went to a football game and had a picnic lunch in the parking lot beforehand, defendant will be convicted of a crime!

It is of course impossible to truly separate this burden of proof issue from the other constitutional infirmities of N.J.S.A. 2C:39-5d, previously stated. Since the statute obviously intends to prohibit the perverted use of otherwise lawful items as weapons, and since the statute is entitled unlawful possession of weapons, the jury must be told that the conduct proscribed by N.J.S.A. 2C:39-5d is intent to use an otherwise lawful item as a weapon. The failure of the New Jersey Supreme Court to so construe the statute failed to save it from unconstitutionality.

CONCLUSION

It is submitted that the Supreme Court of New Jersey erred in sustaining the validity of N.J.S.A. 2C:39-5(d). The statute is unconstitutional because it is vague and/or overbroad. Moreover, the statute unconstitutionally relieves the State of proving each and every element of the offense. The questions thus submitted in this appeal are not only substantial but are of great public

importance warranting plenary consideration of this Court. State statutes repugnant to our United States Constitution must not be permitted to stand.

JOSEPH H. RODRIGUEZ
Public Defender of New Jersey

BY: John M. Apicella
JOHN M. APICELLA
Assistant Deputy Public Defender
Counsel for Appellant

N FOR PUBLICATION WITHOUT E
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3477-80T4

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

CHARLES E. WRIGHT,

Defendant-Appellant.

ORIGINAL FILED
OCT 15 1982
ELIZABETH GAL...PHLIN

Argued August 30, 1982 - Decided OCT 15 1982

Before Judges Pressler and Brody.

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

John M. Apicella, Assistant Deputy Public Defender, argued the cause for appellant (Joseph H. Rodriquez, Acting Public Defender attorney; Mr. Apicella on the letter brief).

Catherine A. Foddai, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Ms. Foddai of counsel and on the brief).

The opinion of the court was delivered by

BRODY, J.A.D.

When police searched defendant after his arrest, they discovered under his sock an Exacto knife held against his ankle by a rubber band. A one-inch razor-like blade, sheathed in cardboard, protruded from its eight-inch handle.

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The knife was designed for use by hobbyists in building wooden models. Defendant was indicted for the unlawful possession of a weapon (N.J.S.A. 2C:39-5(d)), a jury found him guilty, and he was sentenced to a term of 200 days in the county jail.

Defendant argues (1) that it was error for the judge to have omitted from his charge the element of purpose to use the knife unlawfully and (2) that if such purpose is not an element of the crime, the statute creating the crime is thereby rendered unconstitutional as vague, overbroad and violative of the presumption of innocence.

The Legislature created two general categories of possessory weapon offenses: crimes which require that the weapon be possessed "with a purpose to use it unlawfully against the person or property of another" (N.J.S.A. 2C:39-4) and a group of lesser degree crimes where unlawful purpose is not an element of the offense (N.J.S.A. 2C:39-3 and 5). Each of the various simple possession crimes requires consideration of exculpatory circumstances, statutorily defined, which in some cases a defendant has the burden of establishing and in others the State must disprove. For instance, a person possessing a handgun cannot be convicted if he first obtained a permit. N.J.S.A. 2C:39-5(b). A defendant must establish this exculpatory fact. N.J.S.A. 2C:39-2(b). This

allocation of the burden of proof is consistent with pre-Code statutory and case law. See State v. Blanca, 100 N.J.Super. 241, 247-248 (App. Div. 1968). Similarly a person possessing specified per se weapons "without any explainable lawful purpose" has the burden of establishing the lawful purpose. N.J.S.A. 2C:39-3(e); N.J.S.A. 2C:1-13(d)(1). See State v. Tonnisen, 92 N.J.Super. 452, 456 (App. Div. 1966), certif. den. 48 N.J. 443 (1967).

The statute in the present case, N.J.S.A. 2C:39-5(d), deals with unlawful possession of "other weapons," i.e., non per se weapons for which no permit is required. It reads:

> Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree.

Under this statute the State need not prove unlawful purpose. That element is reserved for the more serious crimes defined in N.J.S.A. 2C:39-4. See State v. Brown, ___ N.J.Super. ___ (App. Div. 1982) (slip opinion at 4-5). Therefore, the judge properly charged the jury in this regard. N.J.S.A. 2A:151-41(c), which formerly defined possessory weapon crimes, did not differentiate them as the Code does, and there was no pre-Code analogue to simple possessory crimes. Therefore, State v. Green, 62 N.J. 547, 560 (1973), which read "unlawful purpose" into the pre-Code definition of "dangerous knife," does not apply to this category of Code crimes. We respectfully disagree with the contrary conclusion reached in State in the Interest of T.E.T., 184 N.J.Super. 324, 329-330 (App. Div. 1982).

Although the State need not prove unlawful use or purpose, absence of a lawful purpose is an essential part of the definition of the N.J.S.A. 2C:39-5(d) crime. The State must therefore negate existence of a lawful purpose in order to establish the crime. See State v. Tonnisen, supra, 92 N.J.Super. at 456. The judge properly charged the jury that the State has the burden of proving that defendant's possession of the knife was under circumstances not manifestly appropriate for such lawful uses as it may have.

By relieving the State of having to prove unlawful purpose, N.J.S.A. 2C:39-5(d) is neither vague nor overbroad. The definition of weapon as "anything readily capable of lethal use or of inflicting serious bodily injury" (N.J.S.A. 2C:39-1(r)) is broad. But possession alone of a non per se weapon is not the whole definition of the N.J.S.A. 2C:39-5(d) crime. The State must negate lawful use or purpose. In finding defendant guilty of unlawful possession, the jury had to be satisfied that though the knife was designed for use by hobbyists, the circumstances under which defendant possessed it were not appropriate to that use. While the jury may have suspected that defendant had an unlawful use as his purpose, it did not have to find that as an element of the crime charged since defendant was not charged under N.J.S.A. 2C:39-4(d) (possession for unlawful purposes). When the State has evidence of possession of a non per se weapon for unlawful

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purposes, it may charge under both N.J.S.A. 2C:39-4(d) and N.J.S.A. 2C:39-5(d), the latter being a lesser included offense.

The judge did err in defining "manifestly" in his charge as "easily understood or recognized." While this is one of the dictionary definitions, using it here has the effect of lightening the State's burden of proof in a way not intended by the Legislature. The judge charged:

> If you as the jury find that the circumstances under which the weapon was possessed could not easily be understood or recognized as being appropriate to a lawful use of the instrument in question here then possession of the weapon under those circumstances is prohibited.

Given that instruction, the jury could have convicted defendant even though they were not convinced beyond a reasonable doubt that the State had disproved a lawful purpose, but were convinced beyond a reasonable doubt that a lawful purpose was not "easily understood or recognized" from the circumstances. Under this definition, it would be easier to convict for possession of a non per se weapon where the burden is on the State to negate lawful purpose, than to convict for possession of a per se weapon where the burden is on a defendant to prove lawful purpose "to the satisfaction of the judge or jury."

N.J.S.A. 2C:39-3(e); N.J.S.A. 2C:1-13(d). Apart from any constitutional considerations, the Legislature did not intend such an anomalous result.

We believe that the Legislature intended "manifestly" to mean no more than "demonstrably." The State must prove beyond a reasonable doubt that the circumstances do not demonstrate that defendant possessed the weapon for any lawful use it may have.

Reversed and remanded for a new trial.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

SUPREME COURT OF NEW JERSEY
C-343 SEPTEMBER TERM 1982

20,486

STATE OF NEW JERSEY,

Plaintiff-Petitioner,

vs.

CHARLES WRIGHT,

Defendant-Respondent.

058

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3477-80T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 25th day of January, 1983.

Clerk

FILED
SUPREME COURT
JAN 27 1983
Clerk

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A TRUE COPY
Stephen W. Townsend
CLERK

(37)

SUPREME COURT OF NEW JERSEY
C-344 SEPTEMBER TERM 1982

20,486

STATE OF NEW JERSEY,

Plaintiff-Petitioner,
Cross-Respondent,

vs.

CHARLES WRIGHT,

Defendant-Respondent,
Cross-Petitioner.

CROSS-
ON/PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A/cross-petition for certification of the judgment in A-3477-80T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the/cross-petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 25th day of January, 1983.

Clerk

FILED
SUPREME COURT
JAN 27 1983
Clerk

A TRUE COPY
CLERK

(37)

SUPREME COURT OF NEW JERSEY
A-18/19 September Term 1983

STATE OF NEW JERSEY,

Plaintiff-Appellant
and Cross-Respondent,

vs.

CHARLES WRIGHT, a/k/a MARK EDWARDS,

Defendant-Respondent
and Cross-Appellant.

Argued November 29, 1983 -- Decided May 7, 1984

On certification to the Superior Court, Appellate Division.

Mark Paul Cronin, Deputy Attorney General, argued the cause for appellant and cross-respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Catherine A. Poddai, Deputy Attorney General, of counsel and on the briefs).

John M. Apicella, Assistant Deputy Public Defender, argued the cause for respondent and cross-appellant (Joseph H. Rodriguez, Public Defender, attorney).

The opinion of the Court was delivered by

POLLOCK, J.

Like the companion case of State v. Lee, ___ N.J. ___ (1984), decided today, this matter raises the issue whether N.J.S.A. 2C:39-5d is unconstitutionally overbroad or vague. We hold that proof of intent to use a weapon for an unlawful purpose is not

necessary to save the statute from a challenge of unconstitutionality. Furthermore, we find that the trial court delivered an adequate charge. Consequently, we reverse the judgment of the Appellate Division, which found the charge to be inadequate, and reinstate defendant's conviction.

During the evening of September 1, 1979, defendant, who was the subject of several outstanding arrest warrants, and a friend were standing at the intersection of East Forest and Arlington Avenues in Teaneck, New Jersey. A detective patrolling the area in an unmarked vehicle tentatively identified defendant, radioed for help, and pulled his vehicle into a gas station at the corner. The detective called to the defendant by his nickname, "Pumpkin," but defendant did not reply. Instead, defendant and his companion began walking away from the intersection. When the detective approached him, defendant identified himself as "Mark Edwards" of Hackensack. A patrolman, who was acquainted with the Wright family, arrived and positively identified defendant as Charles Wright.

The officers arrested the defendant on the basis of the outstanding warrants, quickly frisked him, and took him to headquarters, where a more thorough search was conducted. Inside defendant's sock and strapped to his ankle by a rubber band, the police found an Exacto knife, with an eight-inch handle and a one-inch razor-like blade, protected by a cardboard sheath. Thereupon the police charged Wright with violating N.J.S.A. 2C:39-5d, which states that anyone who knowingly possesses a

weapon "under circumstances not manifestly appropriate for such lawful uses as it may have" can be convicted of a fourth degree crime.

The trial court instructed the jury that the term "manifestly" meant "easily understood or recognized by the mind." The charge continued, "[i]f you * * * find that the circumstances under which the weapon was possessed could not be easily understood or recognized as being appropriate to a lawful use of the instrument in question here then possession of the weapon * * * is prohibited."

Furthermore, the trial court instructed:

> You must consider all of the surrounding circumstances and facts in evidence including the size, shape and condition of the weapon, the nature and means of its concealment, if any, and the time, place and actions of the defendant when the weapon was found in his possession. If upon considering all the evidence you conclude that the defendant possessed the instrument under circumstances not manifestly appropriate for one of its lawful uses then possession is prohibited within the meaning of this statute, [sic] therefore, in order to warrant a conviction you must be satisfied beyond a reasonable doubt from all of the facts and surrounding circumstances that the defendant knowingly possessed a weapon and that the circumstances under which the weapon was possessed were not manifestly appropriate for any lawful use that the weapon might have.

The jury convicted defendant, who received a sentence of 200 days in the Bergen County jail, with a credit for 184 days of time served.

The Appellate Division reversed the conviction. 187 N.J. Super. 160 (1982). Although it agreed with the trial judge

that the State need not prove an "intent to use for an unlawful purpose," the appellate court found reversible error in that part of the charge that defined "manifestly" as "easily understood or recognized." Although the Appellate Division acknowledged that the trial court's definition "is one of the dictionary definitions," 187 N.J. Super. at 164, it concluded that the trial judge impermissibly reduced the State's burden of proof. The Appellate Division would have defined "manifestly" as "demonstrably." We disagree. When considered in its entirety, the trial court's charge adequately set forth the elements of the crime. Furthermore, as discussed more fully in State v. Lee, supra, __ N.J. ___, we find that 2C:39-5d is neither unconstitutionally overbroad nor vague. Accordingly, we reverse the judgment of the Appellate Division, which remanded the matter for a new trial, and reinstate defendant's conviction.

Chief Justice Wilentz and Justices Schreiber, Handler, O'Hern and Garibaldi join in this opinion.

Justice Clifford has filed a separate dissenting opinion.

SUPREME COURT OF NEW JERSEY
A-18/19 September Term, 1983

STATE OF NEW JERSEY,

Plaintiff-Petitioner
and Cross-Respondent,

v.

CHARLES WRIGHT, a/k/a/ MARK EDWARDS,

Defendant-Respondent
and Cross-Appellant.

CLIFFORD, J., dissenting

For substantially the same reasons as expressed in my dissenting opinion in State v. Lee, ___ N.J. ___, ___ (1984), decided this day, I would affirm the judgment of the Appellate Division reversing defendant's conviction and remanding for a new trial.

SUPREME COURT OF NEW JERSEY
A-69 September Term 1983

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RONALD LEE, a/k/a JOHN DAVIS,

Defendant-Appellant.

Argued November 29, 1983 -- Decided May 7, 1984

On certification to the Superior Court, Appellate Division, whose opinion is reported at 188 N.J. Super. 432 (1982).

Judith L. Borman, Assistant Deputy Public Defender, argued the cause for appellant (Joseph H. Rodriguez, Public Defender, attorney).

Mark Paul Cronin, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Mr. Cronin, Victoria Curtis Bramson and Catherine A. Foddai, Deputy Attorneys General, of counsel; Ms. Bramson and Ms. Foddai, on the brief).

The opinion of the Court was delivered by
POLLOCK, J.

In this case, we must determine the constitutionality of N.J.S.A. 2C:39-5d, which states that a person who knowingly possesses a weapon other than certain firearms "under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree."

A majority in the Appellate Division found an explicit charge on defendant's intent unnecessary "as long as the crime was defined in terms of the circumstances surrounding the possession of the weapon." 188 N.J. Super. 432, 435 (1982). The court described the standard of "circumstances not manifestly appropriate" for lawful uses, however, as the functional equivalent of an unlawful intent to use. Id. at 436.

Furthermore, the court rejected defendant's contentions that the statute was vague, overbroad, and effected an unconstitutional shift of the burden of proof to defendant. Finding that the trial court's charge adequately instructed the jury on the essential elements of the crime, including the intent to use the weapon unlawfully, the court sustained defendant's conviction. Id. at 435-36.

One judge dissented, asserting that the jury was not adequately instructed that an unlawful intent to use the weapon in question, a pair of scissors taped into a makeshift stiletto, was an element of the crime. Id. at 436, 439 (Antell, J.A.D., dissenting). The defendant, who appealed as of right because of the dissent, petitioned for certification on the constitutional issues.

We granted the petition, 94 N.J. 592 (1983), and now affirm the judgment of the Appellate Division. We hold, however, that an "intent to use for an unlawful purpose" is not an element of the offense, and that the statute is constitutional.

I

The Appellate Division summarized the facts:

> The incident giving rise to the charges herein commenced at about 1:25 p.m. on December 8, 1979. James Whitney, an off-duty police officer, entered the kitchen from the living room of his home, at which time he heard a noise on his screen porch. Through a window of the kitchen door the officer saw defendant with his upper torso inside the screen of the porch. Whitney pursued defendant and being unable to apprehend him returned home and telephoned a central dispatch station, reporting the incident, together with a description and direction of flight of the intruder. Lee was eventually apprehended. At the time of his arrest Lee was patted down, as a result of which a pair of scissors taped at the ends, a spool of string, surgical tape and black leather gloves were recovered. Whitney subsequently recognized and identified Lee as the intruder in his home.
>
> At the trial Sgt. Michael O'Donovan was qualified as an expert on weapons and gave his opinion that the taped scissors were useless for their traditional purpose and in the taped condition became a 'stiletto.' Defendant rested without calling witnesses or testifying. Nor did the defendant present any objection to the judge's charge.

[188 N.J. Super. at 434].

The jury found defendant guilty of burglary, N.J.S.A. 2C:18-2, of possession of burglar's tools, N.J.S.A. 2C:5-5, and of the offense that forms the basis for this appeal, possession of a weapon "under circumstances not manifestly appropriate for such lawful use as it may have * * *." N.J.S.A. 2C:39-5d. Defendant, who had a prior criminal record, received a sentence of five years imprisonment on the burglary conviction and a concurrent sentence of eighteen months on the conviction for unlawful possession of a weapon.

In evaluating defendant's challenge to the constitutionality of 2C:39-5d, we begin with an analysis of the relevant sections of the New Jersey Code of Criminal Justice (Criminal Code). Those sections reveal a carefully constructed scheme for the criminalization of possession of weapons in various situations, depending on the nature of the weapon, the intent of the possessor, and the surrounding circumstances. Broadly speaking, chapter 39, of which 2C:39-5d is a part, contains three classes of possessory weapons offenses.

In the first class, the mere possession of certain weapons, such as sawed-off shotguns, constitutes a per se offense. See 2C:39-3b. A subdivision of this category, which concerns implements such as dirks, daggers, and stilettos, makes the possession of those objects an offense unless the defendant can come forward with an explainable lawful purpose for possession of the weapon. See 2C:39-3e. This provision does not relieve the State of its burden of proof, but merely shifts to the defendant the burden of going forward on the issue of "lawful purpose." See State v. Dunlap, 181 N.J. Super. 71, 76 (Law Div. 1981).

A second class of offenses prohibits the possession of a weapon with the intent to use it against the person or property of another. See 2C:39-4a to -4d. The final category, described in the subject statute, 2C:39-5d, prohibits the possession of any weapon other than certain unlicensed firearms "under circumstances not manifestly appropriate for such lawful uses as it may have." The excepted firearms are machine guns, handguns,

rifles, and shotguns, the unlicensed possession of which is, regardless of the intent of the possessor or circumstances surrounding the possession, a crime of the third degree. 2C:39-5a to -5c. As crimes of the third or fourth degree, violations of 2C:39-5a to -5d carry a presumption against incarceration for a first offender. 2C:44-1e.

The preceding categories are useful for understanding the legislative intent, but should not be considered as mutually exclusive. The possession of a particular weapon can be prohibited under one or more of the categories, depending upon the intent of the possessor or the circumstances surrounding the possession. Quite logically, the Legislature made the possession of a given weapon a more serious crime if that possession was accompanied by an intent to use it unlawfully against another. Compare 2C:39-3a (possession of a "destructive device" is a crime of the third degree) with 2C:39-4c (possession of such a device with an accompanying intent to use unlawfully is a second degree crime).

In 2C:39-5d, the Legislature addressed the situation in which someone who has not yet formed an intent to use an object as a weapon possesses it under circumstances in which it is likely to be so used. The obvious intent of the Legislature was to address a serious societal problem, the threat of harm to others from the possession of objects that can be used as weapons under circumstances not manifestly appropriate for such lawful uses as those objects may have. Some objects that may be used as weapons

also have more innocent purposes. For example, a machete can be a lethal weapon or a useful device for deep sea fishing. See State v. Hay, 153 N.J. Super. 346, 349 (App. Div. 1977). A steak knife is appropriate at the dinner table, but sinister when concealed in a car with a BB gun. See In re T.E.T., 184 N.J. Super. 324 (App. Div. 1982).

The underlying problem is protecting citizens from the threat of harm while permitting the use of objects such as knives in a manner consistent with a free and civilized society. The statute addresses the problem by outlawing the possession of various weapons in circumstances where they pose a likely threat of harm to others. In striking a balance, the Legislature recognized that an otherwise innocent object can become such a threat. See Robinson, Imputed Criminal Liability, 93 Yale L.J. 609, 626 (1984) ("[p]ossession offenses seek to prohibit and punish not possession itself, but harmful conduct, past or future, that is evidenced by the possession.").

The former criminal statutes contained two sections that are predecessors of 2C:39-5d. One section criminalized the possession of a weapon "with intent to use it unlawfully against another." N.J.S.A. 2A:151-56. Another section, N.J.S.A. 2A:151-41, proscribed the possession of certain enumerated objects, including a "dangerous knife." Although this section did not expressly require an unlawful intent to use the weapon, this Court interpreted the statutory prohibition against dangerous knives to include the requirement of such an intent.

State v. Green, 62 N.J. 547, 560 (1973).

We find that many of the circumstances formerly found by this Court to indicate possession of a knife with an unlawful purpose under 2A:151-41 also demonstrate possession that is not manifestly appropriate under 2C:39-5d. As the Court stated in State v. Green, supra, 62 N.J. at 560: "surrounding circumstances - such as the size, shape and condition of the knife, the nature of its concealment, the time, place and actions of the carrier when found in his possession" indicate that the purpose of carrying the knife is its use as a weapon. Those same circumstances indicate that possession of a knife may be "not manifestly appropriate" for its lawful use.

The criminalization of the possession of a weapon with the intent to use it unlawfully against another is carried forward in 2C:39-4d. Hence, reading a requirement of an unlawful intent into 2C:39-5d would render that section superfluous. Cf. State v. Brown, 185 N.J. Super. 489, 493 (App. Div. 1982) (requiring "intent" under 2C:39-7 would render it meaningless in light of 2C:39-4d).

The history of the Criminal Code, although unclear, sheds some light on whether 2C:39-5d requires proof of intent to use a weapon for an unlawful purpose. As originally proposed, the Criminal Code defined "weapon" as "anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have." See New Jersey

Law Revision Commission, New Jersey Penal Code, Volume I: Report and Penal Code 135 (1971) (proposed § 2C:39-1p) [hereinafter cited as Volume I].

Another section in the original draft of the Criminal Code proscribed possession of weapons in general by making it a crime of the fourth degree for any person to knowingly have in his possession any firearm or weapon. See Volume I at 137 (proposed § 2C:39-3g). As enacted, the Criminal Code moved the phrase "possessed under circumstances not manifestly appropriate for lawful use which it may have" from the definition of "weapon" into 2C:39-5d, where it was consolidated with the provision criminalizing the knowing possession of a weapon.

Interestingly, the "not manifestly appropriate" phrase also appears in the Model Penal Code definition of "weapon," the possession of which gives rise to a presumption of criminal purpose. Model Penal Code § 5.06, 10 U.L.A. 504-05 (1974). Although it is the basis for many provisions in the Criminal Code, the Model Penal Code is not cited as a source for N.J.S.A. 2C:39-5d. The absence of a reference to the Model Penal Code, although not essential to our analysis, tends to support the conclusion that the Legislature sought to negate proof of unlawful purpose as an element of the offense.

From the foregoing, we conclude that the Legislature did not require proof of an intent to use a weapon for an unlawful purpose as an element of a violation of 2C:39-5d. Accordingly,

we disagree with both the majority and dissenting opinions in the Appellate Division insofar as they required proof of an unlawful intent to sustain the conviction. Furthermore, we overrule In re T.E.T., supra, 184 N.J. Super. 324, insofar as it requires intent as an element of 2C:39-5d.

In this case, the trial court gave the normal instruction that the defendant is presumed innocent and that the burden of proof is on the State throughout the trial. After specifically stating that the defendant has no burden of proof, the trial court read N.J.S.A. 2C:39-5d as part of the charge. The court then instructed the jury that the State was obliged to prove that the taped scissors was a weapon, that the defendant knowingly possessed them, and that the possession was "under circumstances not manifestly appropriate for a lawful use." By way of further explanation, the trial court equated "manifestly" with "obviously." As previously indicated, the defendant did not object to the charge.

Contrary to defendant's contention on appeal, the statute does not require him "to come forth and prove that his possession is not inappropriate." That argument is invalid because, as the trial court instructed the jury, the State bears both the burden of proof and of coming forward with the evidence. Hence, the statute does not effect an unconstitutional shift in the burden of proof.

II

We next consider whether the statute as interpreted is unconstitutionally vague or overbroad. The first step is to determine if the statute is overbroad. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S. Ct. 1186, 1191, 71 L.Ed.2d 362, 369, reh'g denied, ___ U.S. ___, 102 S. Ct. 2023, ___ L.Ed.2d ___ (1982) (Flipside). In making that analysis, the question is whether the enactment reaches a "substantial amount of constitutionally protected conduct." Flipside, supra, 455 U.S. at 494, 102 S. Ct. at 1191, 71 L.Ed.2d at 369. The standard is not whether the law's meaning is sufficiently clear, but whether the reach of the law extends too far in fulfilling the State's interest. Town Tobacconist v. Kimmelman, 94 N.J. 85, 125 n.21 (1983).

As a general proposition, however, the overbreadth doctrine is invoked when an enactment impinges upon first amendment rights. See, e.g., Central Hudson Gas v. Public Serv. Comm'n of New York, 447 U.S. 557, 565 n.8, 100 S. Ct. 2343, 2351 n.8, 65 L.Ed.2d 347, 350 n.8 (1980); Broadrick v. Oklahoma, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2915-16, 37 L.Ed.2d 830, 839-40 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168, 92 S. Ct. 1965, 1969, 32 L.Ed.2d 627, 634 (1972); In Re Hinds, 90 N.J. 604, 617-19 (1982). See generally L. Tribe, American Constitutional Law § 12-24 (1978); Note, Overbreadth Review and the Warren Court, 49 N.Y.U. L. Rev. 532 (1974); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 845-46 (1970).

Indeed, the overbreadth doctrine emanates from the notion that "[f]irst amendment freedoms need breathing space to survive * * *." N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L.Ed.2d 405, 418 (1963).

Here, the statute does not impinge upon any first amendment right; in fact, as interpreted, it does not reach any constitutionally-protected conduct. The statute affects only the knowing possession of a weapon under circumstances "not manifestly appropriate" for lawful uses of that weapon. Hence, the statute does not fail because of overbreadth. It remains to consider the contention that the statute is unconstitutionally vague.

Vagueness "is essentially a procedural due process concept grounded in notions of fair play." State v. Lashinsky, 81 N.J. 1, 17 (1979). The vagueness test "demands that a law be sufficiently clear and precise so that people are given notice and adequate warning of the law's reach." Town Tobacconist v. Kimmelman, supra, 94 N.J. at 125 n.21.

A penal statute should not become a trap for a person of ordinary intelligence acting in good faith, but rather should give fair notice of conduct that is forbidden. Cf. Colautti v. Franklin, 439 U.S. 379, 395, 99 S. Ct. 675, 685, 58 L.Ed.2d 596, 609 (1979) (disapproving statute that was found to be little more than a trap for those acting in good faith); In re DeMarco, supra, 83 N.J. at 37; State v. Lashinsky, supra, 81 N.J. at 18.

A defendant should not be obliged to guess whether his conduct is criminal. Nor should the statute provide so little guidance to the police that law enforcement is so uncertain as to become arbitrary. Kolender v. Lawson, ___ U.S. ___, ___, 103 S. Ct. 1855, 1860, ___ L.Ed.2d ___, ___ (1983).

The Legislature has considerable latitude in addressing criminal conduct. It can either prepare a detailed catalogue of proscribed activities or, within constitutional limits, address the problem more generally. See Sanitary Vendors v. Byrne, 40 N.J. 157, 166 (1963). The wisdom of a more general approach to the definition of certain possessory offenses is made manifest by the facts of this case. It is doubtful that a legislator, no matter how meticulous, would have thought of including scissors taped into a stiletto on a list of prohibited weapons.

That the prohibited behavior is not susceptible to precise definition need not lead to legislative paralysis. The words of the challenged statute are a sufficient warning so that an ordinary person "is apprised with a reasonable degree of certainty of that which is proscribed." State v. Joas, 34 N.J. 179, 187 (1961) (sustaining statute prohibiting careless driving as sufficiently specific to withstand constitutional scrutiny). Similarly, law enforcement officers are on notice that mere possession of a potential weapon is not sufficient to justify an arrest. The possession of a weapon must be knowing and "not manifestly appropriate" for such lawful uses as the object may have. See State v. Colon, 186 N.J. Super. 355, 357-58 (App. Div.

1982).

Even applying the high standard of certainty that pertains to a vagueness challenge in a criminal case, Kolender v. Lawson, supra, ___ U.S. at ___ n.8, 103 S. Ct. at 1859 n.8, ___ L.Ed.2d at ___n.8, we find that the statute, as interpreted, is not "impermissibly vague in all its applications." Flipside, supra, 455 U.S. at 495, 102 S. Ct. at 1186, 71 L.Ed.2d at 369. Close cases may arise, but this is not one of them. Possible vagueness of the statute with respect to other behavior does not permit one whose conduct is clearly prohibited to act with impunity. Flipside, supra, 455 U.S. at 495, 102 S. Ct. at 1191, 71 L.Ed.2d at 369. It would be difficult to imagine a less appropriate possession of a makeshift stiletto than one on the person of an intruder into a home.

As modified, the judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Justices Schreiber, Handler, O'Hern and Garibaldi join in this opinion.

Justice Clifford has filed a separate dissenting opinion.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RONALD LEE, a/k/a JOHN DAVIS,

Defendant-Appellant.

CLIFFORD, J., dissenting.

If the woeful lack of precision in our public discourse has not yet reached scandalous proportions, it bodes fair soon to do so. Teetering on the brink of that hyperbole, I view today's decision as making a significant, if unwitting, contribution to the decline of exactness in speech, thereby advancing an unfortunate trend that our every effort should be bent on retarding.

Not only has the Court swept aside respected authority (State v. Green, 62 N.J. 547 (1973), and In re T.E.T., 184 N.J.Super. 324 (App.Div.1982)) with its holding that proof of intent to use a weapon for an unlawful purpose is not required to sustain a violation of N.J.S.A. 2C:39-5d; it

has succeeded in cloaking the statutory language "not manifestly appropriate" with wholly undeserved respectability. The first, a disregard of established case law, is one thing -- an affront to the dignity of precedent, but endurable. The second, however, is quite another -- an insult to civilized parlance that in this instance depreciates an indispenable characteristic of the law: concise expression and clarity of meaning. See Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 631, 636-67 (1977) (concurring opinion).

At the outset I would record my agreement with Judge Antell, dissenting below, that even if we were able to agree on an acceptable meaning of "not manifestly appropriate," its use presents an insurmountable obstacle to any coherance in this criminal statute.

> If read literally the statutory language would encompass countless situations which the Legislature could not have intended as the subject of prosecution. The workman carrying home a linoleum knife earlier used in his work; the paring knife inadvertently left on an automobile floor after being used for a lawful purpose; a stevedore's hook or a fisherman's gaff thrown into a vehicle and forgotten. A "weapon" could include a brick, a baseball bat, a hammer, a broken bottle, a fishing knife, barbed wire, a knitting needle, a sharpened

> pencil, a riding crop, a jagged can, rope, a screwdriver, an ice pick, a tire iron, garden shears, a pitch fork, a shovel, a length of chain, a penknife, a fork, metal pipe, a stick, etc. The foregoing only illustrate the variety of lawful objects which are often innocently possessed without wrongful intent, but under circumstances which are clearly not "manifestly appropriate" for their lawful use.
>
> Possession of a fork is manifestly appropriate only at the dinner table, of a bat on the athletic field, of a shovel in the garden. It cannot be reasonably concluded that this penal enactment was actually intended to apply to possession of these commonplace articles in the myriad circumstances when its appropriateness is less than "manifest." It has long been the rule that "where a literal reading of the statute leads to absurd consequences 'the court must restrain the words' and seek the true legislative intent." Furthermore, in this case a literal reading of the statute breaches the precept that "[p]enal laws must be clear enough so that 'all men subject to their penalties may know what acts it is their duty to avoid.'"
>
> [184 N.J.Super. at 437 (citations omitted).]

Even apart from the language problem, as Judge Antell saw it (again I agree),

> [although] the circumstances of this defendant's possession of the taped scissors suffice to support a finding of intent to use them as a weapon, the jury was not instructed that such a finding must be made as a condition to arriving

> at a guilty verdict. Since defendant's intent was an element of the crime charged, he was entitled to such an instruction from the court without a request that it be given.
>
> [Id.]

But the trouble -- and more the source of this fulmination -- is that "not manifestly appropriate" is so lacking in any precise meaning as to defy definition. The Court, wisely, does not even hazard one. As Judge Antell's examples demonstrate, meaning is best ascertained by resort to illustrations -- perhaps only that way. To invest the expression with sufficient significance as to allow its use in a criminal statute is to disparage the requirement of meticulous articulation.

"Not manifestly appropriate" drips with subjective content: what is "not manifestly appropriate" to one may be perfectly appropriate to another. Before this esoteric exercise gets out of hand, an example: I consider it to be "not manifestly appropriate" -- maybe even "manifestly inappropriate" (although surely they do not carry the same meaning) -- to overlook, in the company of ladies, certain amenities: the relinquishment of my seat in a public conveyance when, for want of space, a lady is obliged to

stand; the removal of my hat when a lady enters the elevator; the holding of a door -- that sort of thing. Some of my younger friends doubtless view this as horse-and-buggy bunkum, being of the view that observance of any of the foregoing civilities in this day and age is surely "not manifestly appropriate," and is possibly "manifestly inappropriate." Our differences are traceable at least as much to variations of meaning that inhere within such an expression as they are to our respective notions of chivalry or to a generation gap.

The point is that a phrase like "not manifestly appropriate" runs the risk, intolerable in a criminal statute, of wild swings of meaning. We should not undertake to justify its use in this statute by assuming that "we all know what it means."

> Traditionalists revere their mother-tongue (how apt is the piety of that formulation!) not out of a perverse delight in quibbling nor * * * out of a slavish adherence to arbitrary rules and antique forms, but rather because they realize that language is the participatory instrument of intellection. From this perspective language is not simply a means of communication but also an ethical art * * *. The practice of that art involves solicitude for precision, devotion to the possibilities of imagery, and above all delight in the intricate play of word-craft -- the kind

of delight that follows only upon reverence.

[Salemi, Book Review, 19 The University Bookman, 45, 47 (1979) (reviewing J. Hook, English Today: A Practical Handbook (1976)).]

I would reverse and remand.

MOTION

ORIGINAL

Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS
CLERK

No. 84-5060

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CHARLES WRIGHT, Appellant

v.

THE STATE OF NEW JERSEY, Appellee

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS THE APPEAL

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U.S. Sup. Ct. Rule 16.1 (b) 4

MOTION TO DISMISS THE APPEAL

This motion is made to dismiss this appeal on the ground that no substantial federal question is presented in this case. 28 U.S.C. Sec. 1252(2); U.S. Sup. Ct. Rule 16.1(b).

QUESTION PRESENTED

Should this appeal be dismissed because no substantial federal question is raised?

STATUTES INVOLVED

Appellant was convicted of violating N.J. Stat. Ann. sec. 2C:39-5d (West), which provides:

> Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree.

N.J. Stat. Ann. sec. 2C:39-1r (West) defines "weapon" as:

> "Weapon" means anything readily capable of lethal use or of inflicting serious bodily injury. The term includes, but is not limited to all (1) firearms, even though not loaded or lacking a clip or other component to render them immediately operable; (2) components which can be readily assembled into a weapon; and (3) gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, billies, blackjacks, bludgeons, metal knuckles, sandclubs, slingshots, cestus or similar leather bands studded with metal filings or razor blades imbedded in wood; and any weapon or other device which projects, releases, or emits tear gas or any other substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air.

STATEMENT OF FACTS

Appellant Charles Wright was charged in Bergen County, New Jersey Indictment No. S-226-80 with possession of a weapon, an exacto knife, under circumstances not manifestly appropriate for its lawful use. It was alleged that this conduct violated N.J. Stat. Ann. sec. 2C:39-5d (West). Appellant was tried on January 14 and 19, 1981 before a jury.

At trial it was proved that on the evening of September 1, 1979, appellant and another male were standing on a corner in Teaneck, New Jersey. He was seen by Detective Robert Shumpert, and recognized as being the subject of several outstanding warrants. The detective summoned assistance on his radio and followed the two males, who had begun to walk away.

When a second officer arrived, appellant was stopped and asked to identify himself. He gave a fictitious name, but was identified by a third officer who had arrived and had known appellant for some time. Appellant was then arrested on the outstanding warrants, frisked and taken to police headquarters.

An extensive search of appellant's person was conducted at headquarters. An exacto knife was found in appellant's sock. The eight-inch long knife was secured to the inner part of his ankle with a rubber band; the one-inch razor blade was encased in a piece of cardboard.

At trial, over appellant's objection that N.J. Stat. Ann. sec. 2C:39-5d (West) is unconstitutionally vague, broad and shifts the burden of proof, appellant was convicted of the crime of possession of a weapon under circumstances not manifestly appropriate for its lawful use. On March 21, 1981, appellant was sentenced to a term of 200 days in the Bergen County Jail.

Appellant filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division on April 23, 1981. In that court, appellant again contended that N.J. Stat. Ann. sec. 2C:39-5d (West) was vague, overbroad and shifted the burden of proof. The court rejected these arguments but reversed the conviction and ordered a new trial, sua sponte, upon the ground that the trial court had not properly defined the term "manifestly" in its charge to the jury. State v. Wright, 187 N.J. Super. 160, 453 A.2d 1352 (App. Div. 1982), rev'd 96 N.J. 170, 475 A.2d 38 (1984).

The State of New Jersey filed a Petition for Certification to the Supreme Court of New Jersey and appellant

filed a cross-petition. Both petitions were granted January 25, 1983. On May 7, 1984, the Supreme Court of New Jersey reversed the judgment of the Appellate Division regarding the propriety of the jury instruction, and reinstated appellant's conviction. State v. Wright, 96 N.J. 170, 475 A.2d 38 (1984). The court relied upon its opinion in the companion case of State v. Lee, 96 N.J. 156, 475 A.2d 31 (1984), in rejecting the arguments that N.J. Stat. Ann. sec. 2C:39-5d (West) was unconstitutionally vague, overbroad or shifted the burden of proof.

Appellant has now filed a Notice of Appeal and Jurisdictional Statement in this Court and is proceeding in forma pauperis. Appellee, the State of New Jersey, moves to dismiss the appeal because it presents no substantial federal question.

LEGAL ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED FOR FAILURE TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant asserts jurisdiction in this Court pursuant to 28 U.S.C. Sec. 1257(2):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnanant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

In order to maintain an appeal pursuant to this provision, the federal question must be substantial. In order to be substantial, the issue must be one which has not been previously resolved by this Court. Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 391, 72 S.Ct. 842, 843, 96 L.Ed. 1022, 1026 (1952). Further, it is "... well-settled and,

indeed, now elementary doctrine that although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question of such an unsubstantial character as to cause it to be devoid of all merit, and therefore frivolous...." Deming v. Carlisle Packing Co., 226 U.S. 102, 105, 33 S.Ct. 80, 81, 57 L.Ed. 140, 142-143 (1912). Appellee submits that the issues presented in this appeal are not substantial and that the appeal should, therefore, be dismissed. U.S. Sup. Ct. Rule 16.1(b).

Appellant levels three challenges to N.J. Stat. Ann. sec. 2C:39-5d (West), the statute under which he was convicted. That statute provides:

> Any person who knowingly has in his possession any ... weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree.

A weapon, in turn, is defined in N.J. Stat. Ann. sec. 2C:39-1r as "anything readily capable of lethal use or of inflicting serious bodily injury."

Appellant contends that the statute is vague, in that it provides inadequate notice of the prohibited conduct and inadequate guidelines for law enforcement. Appellant contends that the statute is overbroad, but makes no argument in support of that contention.[1] Lastly, appellant contends that the

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[1] Appellee takes this silence as a concession that the doctrine of overbreadth has no applicability to this case. That doctrine is invoked only when the enactment at issue reaches a "... substantial amount of constitutionally protected conduct." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed. 2d 362, 369 (1982). As a general rule, the doctrine is invoked with respect to first amendment rights. See, e.g., Central Hudson Gas v. Public Service Comm'n of New York, 447 U.S. 557, 565 n.8, 100 S.Ct. 2353, 2351 n.8, 65 L.Ed. 2d 347, 350 n.8 (1980); Broadrick v. Oklahoma, 413 U.S. 601, 611-612, 93 S.Ct. 2908, 2915-16, 37 L.Ed. 2d 830, 839-40 (1973). As the New Jersey Supreme Court found, "Here, the statute does not impinge upon any first amendment rights; in fact, as interpreted, it does not reach any constitutionally protected conduct." State v. Lee, 96 N.J. 156, 165, 475 A.2d 31, 35-36 (1984).

statute unconstitutionally shifts the State's burden of proof of an element of the offense - that the defendant intended to use the weapon against the person or property of another - to the defendant. This contention is premised upon the assertion that the statute must include as an element of the offense the requirement that a defendant possessed the item for use as a weapon. As even appellant concedes (Jurisdictional Statement, p. 10, lines 14-16), his argument is somewhat circular: the statute is vague because it does not require proof of intent to use a weapon against another, and the statute shifts the burden of proof because the State should be required to prove the defendant's intent to use the weapon. Appellee submits that the statute provides adequate notice of the prohibited conduct and requires the State to prove beyond a reasonable doubt every element of the crime.

A penal statute must give fair notice of what conduct is forbidden. Rose v. Locke, 423 U.S. 48, 96 S.Ct. 243, 244, 46 L.Ed. 2d 185, 188 (1975); Wainwright v. Stone, 414 U.S. 21, 22, 94 S.Ct. 190, 192, 38 L.Ed. 2d 179, 181 (1973). Additionally, it must provide adequate guidance to the police so that law enforcement is not so uncertain as to become arbitrary. Kolender v. Lawson, ___ U.S. ___, ___, 103 S.Ct. 1855, 1860, 75 L.Ed. 2d 903, 910 (1983). Applying these standards, it is clear that the New Jersey statute is not vague.

The legislatures are, of course, given considerable latitude in addressing criminal conduct. When the legislative object is appropriate and the conduct is not susceptible of definition in other than general language, there is no constitutional impediment to its use. United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538,1541-42, 91 L.Ed. 1877, 1882-1883 (1947). The New Jersey legislature has wisely eschewed an attempt to list all items which could be classified as weapons and has instead chosen a descriptive definition. Any person can readily determine whether a particular object is

"readily capable of lethal use or inflicting serious bodily injury." Further, the lawful uses of a given item are universally ascertainable. If the circumstances surrounding the possession of a weapon are not easily understood or recognized as appropriate to its lawful use, the possession is "not manifestly appropriate." State v. Wright, 96 N.J. 107, 172-173, 475 A.2d 38, 39-40 (1984). Thus, a person is apprised with a reasonable degree of certainty of that which is proscribed and law enfofcement officers are on notice that mere possession of a weapon is insufficient to justify arrest. "The possession must be knowing and 'not manifestly appropriate' for such lawful uses as the object may have." State v. Lee, supra, 96 N.J. at 166, 475 A.2d at 36. Thus, N.J. Stat. Ann. sec. 2C:39-5d (West) demonstrably is not unconstitutionally vague.

Appellant's burden of proof contention requires little discussion. There is no element of intent to use for unlawful purposes in N.J. Stat. Ann. sec. 2C:39-5d (West). State v. Lee, supra, 96 N.J. at 163-164, 475 A.2d at 34-35. That element is found in N.J. Stat. Ann. sec. 2C:39-4d (West), a greater offense (a crime of the third degree) than that of which appellant was convicted (a fourth degree crime). Obviously, the State need not prove that which is not an element of the offense. Further, the State must prove, beyond a reasonable doubt, that the possession was not manifestly appropriate for lawful use. The defendant need prove nothing with respect to that crime. State v. Lee, supra, 96 N.J. at 164, 475 A.2d at 35.

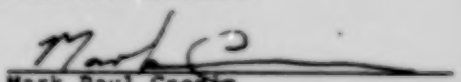
CONCLUSION

Appellee submits that this appeal should be dismissed for failure to present a substantial federal question. Appellant does not contend that some new interpretation of federal constitutional principles is warranted. He seeks merely to apply settled precedent to a statute which has been interpreted by the New Jersey Supreme Court. The application of

this settled law must result in the affirmance of the State court's decision, inasmuch as the statute at issue provides clear notice of the prohibited conduct and requires the State to prove every element of the offense. For these reasons, the appeals should be dismissed.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR APPELLEE

BY: 
Mark Paul Cronin
Deputy Attorney General

OPINION

SUPREME COURT OF THE UNITED STATES

CHARLES WRIGHT *v.* NEW JERSEY

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 84–5060. Decided January 14, 1985

The appeal is dismissed for want of a substantial federal question.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The appellant Charles Wright was convicted of possessing an "exacto" knife. Under New Jersey law, possession of this sort of object is entirely legal in most circumstances; possession becomes unlawful only "under circumstances *not manifestly appropriate* for such lawful uses as it may have." N. J. Stat. Ann. §2C:39–5d (West) (emphasis added).[1] As construed by the state courts, although this statute requires proof that the defendant "knowingly" possessed the object in question, there is no requirement that he have done so with any unlawful purpose.

The Supreme Court of New Jersey affirmed the constitutionality of §2C:39–5d in this and a companion case, see 96

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[1] This section provides in its entirety: "Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree."

N. J. Stat. Ann. §2C:39–1r (West) in turn defines "weapon" as "anything readily capable of lethal use or of inflicting serious bodily injury. The term includes, but is not limited to, all (1) firearms, even though not loaded or lacking a clip or other component to render them immediately operable; (2) components which can be readily assembled into a weapon; and (3) gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, billies, blackjacks, bludgeons, metal knuckles, sandclubs, slingshots, cestus or similar leather bands studded with metal filings or razor blades imbedded in wood; and any weapon or other device which projects, releases, or emits tear gas or any other substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air."

N. J. 170, 475 A. 2d 38 (1984); *State* v. *Lee*, 96 N. J. 156, 475 A. 2d 31 (1984), with one justice arguing in dissent that the operative standard "not manifestly appropriate" is "so lacking in any precise meaning as to defy definition," *State* v. *Lee*, *supra*, at 168, 475 A. 2d, at 37 (Clifford, J., dissenting). I believe this appeal presents the substantial question whether § 2C:39–5d is impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, I respectfully dissent from the Court's dismissal of the appeal for want of a substantial federal question.

I

Wright, the subject of several outstanding arrest warrants, was apprehended while conversing with a friend on a street corner in Teaneck, New Jersey. The arresting officers searched Wright at police headquarters, where they found the exacto knife in question concealed inside one of his socks. The instant prosecution for violation of § 2C:39–5d followed.

At trial, Wright contended that he had not intended to use the knife against person or property and that the statute is unconstitutionally vague. The trial court rejected these arguments. With respect to the question of Wright's intent, the court instructed the jury that it was "not necessary that the State prove that [the] defendant possessed the weapon with a purpose to use it unlawfully against the person or property of another." Juris. Statement 4. As for the definition of the "not manifestly appropriate" standard, which Wright contended was meaningless, the court instructed: "[i]f you . . . find that the circumstances under which the weapon was possessed *could not be easily understood or recognized as being appropriate* to a lawful use of the instrument in question here then possession of the weapon . . . is prohibited." *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39 (emphasis added). Wright was convicted as charged and sentenced to 200 days in the Bergen County jail.

The Superior Court of New Jersey, Appellate Division, reversed Wright's conviction, reasoning that the legislature could not have intended to impose criminal sanctions on one whose conduct merely "was not 'easily understood or recognized' from the circumstances." 187 N. J. Super. 160, 164, 453 A. 2d 1352, 1354 (1982). The Supreme Court of New Jersey reversed the Appellate Division, however, and concluded that the trial court's interpretation properly reflected the legislature's intent in enacting § 2C:39–5d. 96 N. J., at 173, 475 A. 2d, at 40.[1] The court rejected Wright's vagueness challenge for the reasons set forth in its companion decision in *State* v. *Lee*, where it had concluded that the "not manifestly appropriate" standard carries "sufficient warning so that an ordinary person 'is apprised with a reasonable degree of certainty of that which is proscribed'" and so that law enforcement officials have sufficient notice of what conduct is prohibited to guard against arbitrary or discriminatory enforcement. 96 N. J., at 166, 475 A. 2d, at 36 (citation omitted). This appeal pursuant to 28 U. S. C. § 1257(2) followed.

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[1] In its companion decision in *State* v. *Lee*, the court summarized the legislature's purpose as follows: "[The statute addresses] the situation in which someone who has not yet formed an intent to use an object as a weapon possesses it under circumstances in which it is likely to be so used. The obvious intent of the Legislature was to address a serious societal problem, the threat of harm to others from the possession of objects that can be used as weapons under circumstances not manifestly appropriate for such lawful uses as those objects may have. Some objects that may be used as weapons also have more innocent purposes. For example, a machete can be a lethal weapon or a useful device for deep sea fishing. . . . A steak knife is appropriate at the dinner table, but sinister when concealed in a car with a BB gun.

"The underlying problem is protecting citizens from the threat of harm while permitting the use of objects such as knives in a manner consistent with a free and civilized society. The statute addresses the problem by outlawing the possession of various weapons in circumstances where they pose a likely threat of harm to others. In striking a balance, the Legislature recognized that an otherwise innocent object can become such a threat." 96 N. J., at 161–162, 475 A. 2d, at 33–34.

II

The standards for evaluating whether a statute is unconstitutionally vague are well settled:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application" (footnotes omitted). *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972).

As construed by the New Jersey courts, § 2C:39–5d authorizes arrest and conviction whenever an individual possesses any object capable of inflicting serious injury in circumstances "not . . . easily understood or recognized as being appropriate" by the authorities and a jury, even though the individual may have had no intent whatsoever to possess or use the object for unlawful purposes. *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39. I believe there is a substantial question whether such an amorphous crime is unconstitutionally vague.

First. I agree with the dissent below that there is a serious question whether the "not manifestly appropriate" standard gives fair notice of the conduct that is prohibited or is instead "so lacking in any precise meaning as to defy definition." *State* v. *Lee*, *supra*, at 168, 475 A. 2d, at 37 (Clifford, J., dissenting).[1] "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). See also *Smith* v. *Goguen*, 415 U. S. 566, 574 (1974); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). To impose criminal sanctions for the possession of objects simply because the authorities and a jury subsequently decide that the circumstances were not "easily understood or recognized as being appropriate," *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39, "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against," *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). The enforcement of such a standardless proscription would appear to be "the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the

[1] As Judge Antell, dissenting from the judgment of the Appellate Division in *State* v. *Lee*, argued: "If read literally, the statutory language would encompass countless situations which the Legislature could not have intended as the subject of prosecution. The workman carrying home a linoleum knife earlier used in his work; the paring knife inadvertently left on an automobile floor after being used for a lawful purpose; a stevedore's hook or a fisherman's gaff thrown into a vehicle and forgotten. A "weapon" could include a brick, a baseball bat, a hammer, a broken bottle, a fishing knife, barbed wire, a knitting needle, a sharpened pencil, a riding crop, a jagged can, rope, a screwdriver, an ice pick, a tire iron, garden shears, a pitch fork, a shovel, a length of chain, a penknife, a fork, metal pipe, a stick, etc. The foregoing only illustrate the variety of lawful objects which are often innocently possessed without wrongful intent, but under circumstances which are clearly not 'manifestly appropriate' for their lawful use.

"Possession of a fork is manifestly appropriate only at the dinner table, of a bat on the athletic field, of a shovel in the garden." 188 N. J. Super. 432, 437, 457 A. 2d 1184, 1187 (1982).

public interest when unjust and unreasonable in the estimation of the court and jury." *Ibid.*

Second. Even more disturbing questions arise with respect to "the more important aspect of the vagueness doctrine . . . —'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983) (citation omitted) (striking down criminal sanctions against persons who fail to provide "credible and reliable" identification).[4] Where a statute and the judicial decisions which interpret it provide inadequate standards to govern its application, the statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis* v. *City of New Orleans*, 415 U. S. 130, 135 (1974) (POWELL, J., concurring in result). The result obviously is to create a scheme that "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 170 (1972) (citation omitted).

As interpreted by the New Jersey courts, § 2C:39–5d does *not* require the State to prove beyond a reasonable doubt that the defendant's possession could not have been pursuant to a legitimate purpose, but merely that the circumstances were "not . . . easily understood or recognized as being appropriate." *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39. Can there be any question that this sweeping standard places "unfettered discretion" in the hands of police, judges, and ju-

[4] The Court has long emphasized the importance of providing minimal guidance. See, *e. g.*, *United States* v. *Reese*, 92 U. S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government"). See also *Gregory* v. *City of Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring) ("[U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat").

ries to carry out "arbitrary and erratic arrests and convictions"? *Papachristou* v. *City of Jacksonville*, *supra*, at 162, 168. Surely this law is unlikely to touch upon the "pillars of the community," *id.*, at 163, who are spotted with any of the multitude of potentially dangerous objects in circumstances that are not "easily understood" or "recognized" as "appropriate." See *supra*, n. 3. Rather, there appears to be a grave danger that enforcement of the law will focus on the groups that historically have been the targets of vague legislation such as this—the poor, the minorities, the politically unpopular, and others who happen to be viewed with suspicion by the community's majority.

The absence from § 2C:39–5d of any requirement that the defendant *intend* to use the object in an unlawful manner accentuates the dangers discussed above. We have "long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979). See generally *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 434–446 (1978).[5] The Supreme Court of New Jersey believed, however, that the "not manifestly appropriate" standard functions as a legitimate proxy for *anticipatory* intent: the challenged statute "address[es] the situation in which someone *who has not yet formed an intent* to use an object as a weapon possesses it under circumstances in which it is *likely* to be so used." *State* v. *Lee*, 96 N. J., at 161, 475 A. 2d, at 33 (emphasis

[5] A statute that requires scienter "mitigate[s]" the vagueness of its other terms by helping to ensure that the defendant had adequate notice and by guarding against capricious enforcement through the requirement that he actually have intended the conduct which the statute seeks to guard against. *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982); see also *Grayned* v. *City of Rockford*, 408 U. S. 104, 111, 114 (1972). The absence of such a requirement, on the other hand, enhances the risks of unfair notice and arbitrary enforcement. See, *e. g.*, *Screws* v. *United States*, 325 U. S. 91, 101–102 (1945) (plurality opinion).

added). See generally *supra*, n. 2. We have emphasized the constitutional invalidity of such presumptions. Punishing someone whose conduct "could not be easily understood," *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39, on the ground that he was "likely" to form a criminal intent in the future

> "is too precarious for a rule of law. The implicit presumption in these generalized . . . standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. [Under such a presumption,] the scales of justice are so tipped that even-handed administration of the law is not possible." *Papachristou* v. *City of Jacksonville*, *supra*, at 171.

The Supreme Court of New Jersey in *State* v. *Lee* advanced two arguments that might be invoked to suggest that Wright's challenge in the instant case is improper. 96 N. J., at 167, 475 A. 2d, at 36. First, it has frequently been stated that a criminal statute will not be struck down unless it is "impermissibly vague in all its applications." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495 (1982). A related doctrine stresses that a statute that might be impermissibly vague with respect to some conduct may not be challenged by one whose conduct quite clearly is prohibited by its terms. *Id.*, at 495, n. 7; *Parker* v. *Levy*, 417 U. S. 733, 756 (1974).

For two reasons, these doctrines do not bar Wright's challenge. First, we have emphasized that where a statute imposes criminal penalties the required standard of certainty is high, and a statute that does not satisfy this requirement may be invalidated on its face "even where it could conceivably have . . . some valid application." *Kolender* v. *Lawson*, 461 U. S., at 358–359, n. 8. See also *Colautti* v. *Franklin*, *supra*, at 394–401; *Lanzetta* v. *New Jersey*, *supra*.[6] Second,

[6]This requirement of heightened certainty has particular force in the arbitrary enforcement context. See, *e. g.*, *Kolender* v. *Lawson*, 461 U. S., at 358–359, n. 8.

the challenged statute must prescribe some coherent, ascertainable standard in the first instance. Where the provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all," it is unconstitutional. *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971) (striking down statute proscribing public conduct "annoying to persons passing by").[7] As interpreted by the state courts, § 2C:39–5d would seem surely to suffer from this fatal defect: it "simply has *no* core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause." *Smith* v. *Goguen*, 415 U. S., at 578 (emphasis in original).

III

"[T]his is not a case where further precision in the statutory language is either impossible or impractical." *Kolender* v. *Lawson*, *supra*, at 361. First, the legislature may proscribe altogether the possession of certain items or the possession of such items in specified circumstances. This it has done in other contexts. See, *e. g.*, N. J. Stat. Ann. § 2C:39–3 (West). Second, it may prohibit the possession of any item capable of use as a weapon where the possession is actually for the purpose of unlawful use. This, too, it has done. See, *e. g.*, *id.* § 2C:39–4d ("Any person who has in his possession any weapon . . . with a purpose to use it unlawfully against the person or property of another is guilty of a

[7]See also *Smith* v. *Goguen*, 415 U. S. 566 (1974) (same with respect to statute punishing anyone who "treats contemptuously" the flag); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939) (same with respect to statute punishing anyone for being, *inter alia*, "a member of any gang consisting of two or more persons"); *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921) (same with respect to statute proscribing the charging of "unjust or unreasonable" prices for staple goods).

crime in the third degree").[4] And it may of course prescribe the full "range of nonpenal alternatives to . . . criminal sanctions." *United States* v. *United States Gypsum Co.*, 438 U. S., at 442.

There is no question that the New Jersey Legislature and the courts below have been motivated in the enactment and construction of § 2C:39–5d by the necessity vigorously to combat crime. See *supra*, n. 2. As important as this goal is, however, "it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Kolender* v. *Lawson*, *supra*, at 361. Because I believe there is a serious question whether the imposition of criminal liability for conduct that "could not be easily understood or recognized as being appropriate" intolerably crosses the constitutional line, I respectfully dissent from the Court's dismissal of this appeal.

JUSTICE POWELL took no part in the consideration or decision of this case.

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[4] As Judge Antell observed in his dissent in *State* v. *Lee*, the manner and circumstances of a defendant's possession of certain objects frequently will suffice "to support a finding of intent to use them as a weapon." 188 N. J. Super., at 429, 457 A. 2d, at 1158. Perhaps the circumstances of Wright's possession would alone be sufficient to prove culpable intent. However, "the jury was not instructed that such a finding must be made as a condition to arriving at a guilty verdict," ibid., and it is not for this Court to make that factual judgment in the first instance.